IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.481 OF 2005

Shishir B.Desai & Anr. ..Petitioners.

V/s.

Ceat Financial Services Ltd.
& Anr. ..Respondents.

Mr.S.V.Marwadi & Sunita Sharma for petitioners.

Mr.D'lima for Respondent No.1.

Mr.U. Nikam, APP for State.

CORAM: A.M.KHANWILKAR,J
DATE : NOVEMBER 19, 2005.

P.C. :

1. Not on board. Upon mentioning taken on board. By consent heard alongwith the Writ Petitions which are already notified today.

2. Heard counsel for the parties.

3. Rule. As short question is raised, rule made returnable forthwith by consent.

4. Mr. D'Lima waives notice for respondent No.1 and Mr. Nikam, APP waives notice for respondent-State.

5. By this petition, it is prayed that Criminal

Case No.742/S/1999 filed against the petitioners/accused No.4 and 5 pending on the file of 12th Court at Bandra, Mumbai be quashed. It is not in dispute that petitioners are Directors of the Accused No.1 company. However, the petitioner No.1 is a practising Solicitor and Petitioner No.2 Chartered Accountant by profession. It is their case that they have no concern with the day to day affairs of the company. It is not in dispute that petitioners are not signatories to the cheques. Relying on the recent decision of the Apex Court in the case of **S.M.S.Pharmaceuticals Ltd. V/s.Neeta Bhalla and Anr.. reported in 2005 SCCL.COM 579 and decision of our High Court in Vijay Mallya V/s. State of Maharashtra & Anr. in Criminal Application no.4827 of 2004** decided on December 23, 2004, the counsel for the petitioners contends that the criminal action instituted against the petitioners who have been named as Accused No.4 and 5 respectively will have to be quashed in so far as the petitioners are concerned. This is so because, the only assertion made in the petition so as to indicate complicity of the petitioner can be discerned from paragraph-3 of the complaint, which reads thus:

"3. The Accused No.1 is a company

> incorporated under the Companies Act, 1956, of which, Accused Nos.2 is the Chairman & Managing Director, Accused No.3 to 7 are its Directors, whose addresses are given in the cause title."

There is no other allegation in the complaint and the allegation referred to therein are too general and vague, so as to proceed against the petitioners for the alleged offence of dishonour of cheques.

6. Counsel for the respondent No.1 complainant however, contends that there is clear assertion made in the complaint in paragraph-8 and 12, which read thus:

> "8. I say that Accused No.1 through Accused Nos. 2 to 7 who are the Chairman and Directors respectively of the accused No.1 and who are in charge of and were responsible for the conduct, management, day to day affairs and functioning of the Accused Company, had issued the said cheques in favour of the Company, in discharge of their legally enforceable debt and liability. I say that the Accused Nos. 2 to 7 who were the Chairman, and Directors respectively at the material time, had empowered the Accused No.1 to avail the Hire Purchase facility from the Company by the Accused No.2 to 7 were well aware that post dated cheques were issued by the Accused No.1 in satisfaction of the liability of the Accused No.1 under the said Hire Purchase transaction. I say that inspite of having the knowledge and being

> responsible for the affairs of the Accused No.1 Company, the accused No.2 to 7 did little to stop the Accused No.1 from committing an offence under section 138 of the Negotiable Act, 1881. The said cheques having been dishonoured by the Accused's Bankers, for reason recorded hereinabove, as the accused's had failed to maintain sufficient balance to honour the said cheques on presentment and the same was dishonoured for want of funds. Accused having not made payment of the amount due under the dishonoured cheques, within the grace period of 15 days from the receipt of the said notice, the Accused have, in the circumstances, committed an offence under Section 138 read with Sections 141 and 142 of the Negotiable Instruments Act, 1881 and are therefore, liable to be punished under the penal provisions of the said Act."
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> "12. I, further, say that in view of the alleged facts and circumstances mentioned hereinabove in the complaint the ingredients of the offence under S.138 read with S.141 and S.142 is clearly made out to justify launching of the prosecution. The dishonest intention can be clearly inferred and the ingredients of the offence under S.138 of the Negotiable Instrument Act, 1881, is prima facie made out. I charge the Accused's of having committed an offence under Section 138 read with S.141 and 142 of the Negotiable Instrument Act, 1881 and pray that this Hon'ble Court take the case on file, issue summons against the Accused Nos. 1 to 11, and punish the Accused's with maximum sentence as per law."

7. Having considered rival submissions and perusing the complaint as filed, I have no hesitation in taking the view that the allegation made in the complaint as against the present petitioners/accused No.4 and 5 is concerned, is not sufficient to proceed

against the petitioners in law. The legal position has been now reiterated by the Apex Court in the recent decision in the case of **S.M.S.Pharmaceuticals Ltd.(Supra).** Something more is required to be alleged, so as to indicate complicity of directors to proceed for offence under section 138 read with 141 and 142 of the Negotiable Instrument Act. The argument that the petitioners/accused No.4 and 5 did not exercise due diligence to prevent commission of offence, as is stated in paragraph-8 and 12, also does not commend to me. In the first place, the assertion is too general. In any case, in so far as offence committed by a company, only person who at the time the offence was committed, "was incharge of and was responsible to, the company for the conduct of the business of the company", is deemed to be guilty of the offence. A priori, merely because the person happens to be one of the director of the Company or that he failed to send reply to the statutory notice or for that matter failed to prevent commission of the offence inspite of the notice will be of no avail.

8. Be that as it may, for the legal position stated by the Apex court and this court in the above said decisions, this petition ought to succeed.

Accordingly, rule is made absolute.

9. It is made clear that it will be open to the trial court to proceed against the remaining accused No.1 to 3, 6 and 7 in accordance with the law.